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Supreme Court of the United States

October Term, 1970

No. 85

GUY PORTER GILLETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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The Interest of the American Ethical Union

This brief is submitted on behalf of the American Ethical Union with the consent, filed with this Court, of the petitioner and the respondent.

The American Ethical Union is a federation of all the Ethical Culture Societies and Fellowships in the United

States which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement." The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of humanist groups and Ethical Culture Societies. In addition to its meetings and community activities, the Ethical Culture Movement has historically been involved in activities of social concern and was instrumental in the founding of the Settlement House movement in New York City, the Ethical Culture Schools, the Child Study Association, the Legal Aid Society and the Encampments for Citizenship.

Ethical Culture has been recognized by this Court as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso* v. *Watkins*, 367 U.S. 488, 495, n. 11 (1961); *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333, 347, n. 8 (1970) (Concurring opinion of Mr. Justice Harlan). See also *Washington Ethical Society* v. *District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957). Ethical Culture has no fixed creed or dogma, and requires no particlar theological beliefs of its members.

> Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such questions.
>
> In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of

mankind. [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York, New York, p. 3]

The Ethical Movement does not rely upon the external authority of a theistic deity for the origins of man's moral obligations and duties towards mankind but instead places primary reliance upon man's conscience for the determination of moral judgments. The Ethical Movement holds that each man is morally responsible for his actions and that ultimately each man must accept the responsibility for his own actions in his relationship to others.

The issue in this case is a matter of serious concern to the American Ethical Union. Ethical Culture is founded on what is thought to be the ethical component of man—i.e., his conscience. Today the conscience of many, particularly the young, is deeply affected by the radical change in warfare of the atomic age. The generation now subject to the draft has lived its entire life in a world which may be annihilated at any moment. Many who might have volunteered in World Wars I or II might not be able conscientiously to participate at all in war where atomic weapons would be used or where weapons of mass and indiscriminate killing are used.

Some members of Ethical Culture Societies are today serving in the Armed Forces; others are affiliated with the Fellowship of Ethical Pacifists, which opposes participation in all wars, and some would object to participation in the Vietnam war but would not necessarily bar participation in all wars. This is consistent with a fundamental tenet of Ethical Culture that each individual is required to make his own moral and ethical decisions.

In his SSS Form 150, Gillette characterized his beliefs as religious and described them as follows:

> Religion, to me, means the devotion of man to the highest ideal that he can conceive. A respect for the dignity and worth of every human being and a capacity to enter into decent and just and loving relations with other human beings is not dependent upon being a member of a specific Religious Sect or organization. (A.27)

Gillette's beliefs would thus appear to be nearly identical to those held by members of Ethical Culture Societies. Indeed, Gillette has himself so characterized them and acknowledged the impact on him of the Ethical Culture Movement:

> Fundamental questions of life: the infliction of pain, suffering or death on other people, is to me, against all principles of my Humanist belief. I believe that the development of ethical values should be a person's supreme aim in life. This belief is basic in the lives of many individuals and of the Society for Ethical Culture. (A.32)

ARGUMENT

I

Section 6(j) of the Military Selective Service Act must be construed and applied so as to accord conscientious objector status to a registrant who otherwise qualifies under *Seeger* and *Welsh* but does not qualify as a total universal pacifist.

We concur in and will not repeat the arguments set forth in petitioner's brief. As pointed out in that brief, Gillette's views are virtually identical to those involved in *Seeger* and *Welsh*. They are also virtually identical to those held by members of Ethical Culture Societies.

Gillette made his moral decision in accordance with an ethical imperative. His conscience clearly compelled him to risk imprisonment rather than become "a part of an instrument of war." Neither the sincerity nor the religious nature of his beliefs is questioned. Yet, the Court below found that Gillette did not qualify for conscientious objector status because of the Act's requirement of opposition "to participation in war in any form." Gillette's views, the Court said:

> "* * * were specifically directed against the war in Vietnam. His position seems to include a willingness to defend his homeland if it were attacked and to fight to enforce a United Nations decision against a country accused of breaking the peace."

In its decision (which was rendered, it should be noted, before this Court's decision in *Welsh*), the Court below stated that Gillette's beliefs were based on humanism and

it assumed for purposes of its decision that his views were "religious * * * as that word is construed to insure the constitutionality of the Act." We submit that such an assumption is compelled in any event by this Court's decisions in *Seeger*, *Welsh*, and *Torcaso*, *supra*.

Does the statutory requirement of opposition to "participation in war in any form" compel the drafting of men like Gillette, whose "consciences, spurred by deeply held moral, ethical or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war"? *Welsh* v. *United States*, 398 U.S. 333 (1970). We think not. We think that result would violate the First and Fifth Amendments to the Constitution. That result, we suggest, can be avoided if the statutory language referring to "participation in war in any form" is construed and applied, as we submit it should be, to mean participation in any form in the war for which the registrant is being conscripted.

"The test is not whether the registrant is opposed to all war, but whether he is opposed * * * to *participation* in war." *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). Thus the statute does not require opposition to every war or complete pacifism on the part of the individual. *Sicurella* v. *United States*, *supra*; *United States* v. *Gearey*, 379 F. 2d 915, 920 (2d Cir.) *cert. den.*, 389 U.S. 959 (1967); *Taffs* v. *United States*, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. den.*, 347 U.S. 928 (1954).

The term "selective" objector is sometimes used as a pejorative for the objector who is said to "pick and

choose" the wars in which he wishes to serve. But this is an unrealistic characterization. When the moral objector "picks and chooses," he actually does no more than face a single specific situation and he applies his moral judgment to it. He does not in fact pick and choose between alternative possibilities all offered to him at the same time. Nor does he in fact "wish" to serve in a particular war; at most, he acquiesces in the dire necessity of doing so.

Moral and ethical objection to war is by its nature selective. The moral principle requires that the individual apply moral judgment to each situation as he finds it, on the basis of all the facts and circumstances. The Fraternity of Leaders* of the American Ethical Union in January 1967, adopted the following statement entitled "Support of War—A Moral Question":

> "* * * the Fraternity of Leaders of the American Ethical Union declares the question of individual participation in or support of war to be a moral question of the highest order, a question which cannot rightfully be ignored. When any person is called upon to support a war effort, he should listen to the leaders of his government, seek out the most objective available news sources and then make a moral decision in the light of his own ethical values and his responsibility to the world community as well as to his own nation. The fact that his government offers him a ready-made

* The Leaders of the Ethical Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

moral position in no way absolves him from the responsibility for making his own decision.

If he concludes that his government is morally and legally right, he should give it his wholehearted support. If he concludes that his government is wrong, he should oppose its policy with equal vigor. When an individual who is liable for military service concludes that a war is wrong, he has not only the moral right but the moral responsibility to announce himself as a conscientious objector. What is ethically imperative for persons of all ages is that they make a moral decision."

As pointed out in petitioner's brief (at p. 50 et seq.), the Catholic Church, many Protestant faiths and Judaism similarly require that the individual determine for himself in each separate instance whether a war is just or unjust and whether, morally, he can or cannot support or participate in it.

An interesting light on this issue is the fact that many an avowed total pacifist claiming irrevocable opposition to participation in any war at any time has subsequently discovered that his moral judgment with respect to a particular war, notably World War II, required that he serve in it. This suggests that for many if not all total pacifists it is in reality the morality of the specific situation of the particular war on which their ultimate conviction is grounded.

We submit that the statute may not be interpreted to distinguish between those religions or beliefs which compel non-participation in all wars and those which compel non-participation in a particular war. If so construed and ap-

plied, the statute would, we submit, violate the First and Fifth Amendments.

In its brief to this Court last Term in *United States* v. *Sisson*, 297 F. Supp. 902 (1969), *appeal dismissed*, 399 U.S. 267 (1970), the Government conceded that the power of Congress granted by Article I, Section 8 of the Constitution to raise and maintain armies is limited by the Bill of Rights and that Congress, in conscripting persons for military service, may neither "invidiously discriminate against any class or person" (Brief for the United States at 40) nor "act in a way which deprives a person of religious freedom or establishes a religion in violation of the First Amendment" (*ibid.* at 43).

Yet the decision of the Court below purports to grant Congress just such power. Its interpretation of Section 6(j) discriminates between those religions and beliefs which compel non-participation in all wars and those which compel non-participation in a particular war. *Amicus* contends that the Court of Appeals' interpretation of the Statute violates the First and Fifth Amendments because (a) it invidiously discriminates between religions and beliefs, (b) it interferes with the free exercise of religious beliefs, and (c) it establishes a preference for some religions or beliefs over others.

The Court below based its decision in part on the finding that Gillette's beliefs were a "moral code", opposed to "a particular employment of the armed services". This finding is contrary to the finding in *Seeger*, *supra* at 186, that

> "The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code

which is not only personal but which is the sole basis for the registrant's belief."

This Court stated in *Welsh, supra*, at 343:

> "Once the Selective Service System has taken the first step and determined under the standards set out here and in *Seeger* that the registrant is a 'religious' conscientious objector, it follows that his views cannot be 'essentially political, sociological or philosophical.' Nor can they be a 'merely personal moral code.' See *United States* v. *Seeger*, 380 U.S., at 186."

The Eighth Circuit in its unanimous decision in *United States* v. *Levy*, 419 F.2d 360 (1969) at 367, stated

> "* * * *Seeger* almost eliminated the 'personal moral code' exception by restricting it to those situations in which it is 'the sole basis for the registrant's belief.' * * * At any rate the Government admits in its brief that 'a moral code must be devoid of religious belief'" (at 368).

The judgment of the Court of Appeals should therefore be reversed.

Conclusion

For the reasons set forth above and in petitioner's brief, we submit that the Military Selective Service Act of 1967 should be so construed and applied as to include petitioner's conscientious opposition to participation in war; that unless the statute is so construed and applied, it is (a) an unconstitutional discrimination against adherents of some religions and persuasions, including many members of Ethical Culture Societies, in violation of both the Es-

tablishment and Free Exercise clauses of the First Amendment, and (b) an arbitrary, unreasonable, and invidious classification in violation of the Fifth Amendment.

Respectfully submitted,

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